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May 13, 1994

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M. Street, NW
Washington, DC 20554

Re: In the Matter of Implementation of
Section 3(n) and 332 of the Communications
Act, Regulatory Treatment of Mobile Services -
GN Docket No. 93-252

Dear Secretary Caton:

Enclosed please find an original and eleven copies of the Petition for Reconsideration of the New York State Department of Public Service in the above-referenced proceeding.

Sincerely,

Kathleen H. Burgess
Kathleen H. Burgess
Assistant Counsel

c:KATE:ay:93-252.Ltr

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544**

In the Matter of)	
)	
Implementation of Section 3(n))	GN Docket No. 93-252
and 332 of the Communications)	
Act, Regulatory Treatment of)	
Mobile Services)	

PETITION FOR RECONSIDERATION

The New York State Department of Public Service (NYDPS), pursuant to 47 CFR §1.429 and §1.4(b), hereby petitions the Federal Communications Commission (Commission) for reconsideration of its Second Report and Order, GN Docket No. 93-252, released on March 7, 1994 in the above-captioned proceeding (Order). Specifically, NYDPS seeks reconsideration of the Commission's finding that if the Commission requires interconnection by all Commercial Mobile Radio Service (CMRS) providers, then it has the authority to preempt state regulation of the rates for interconnection of such service providers.

INTRODUCTION

By its Second Report and Order, noticed in the Federal Register on April 19, 1994, the Commission determined that it would establish a Notice of Inquiry to explore the issue of whether it should require CMRS providers to provide interconnection to other CMRS carriers. Order, ¶237. The Commission stated, however, that the statutory language is clear, that if it does require interconnection by all CMRS providers, the statute preempts state regulation of all interconnection rates of such providers (Order, ¶237).

The NYDPS requests that the Commission reconsider its findings and conclude that 47 USC §332(c)(3) does not authorize preemption of state regulation of intrastate interconnection rates of CMRS providers should it require CMRS providers to provide interconnection to other CMRS carriers.

THE COMMISSION MAY NOT PREEMPT STATE REGULATION
OF INTRASTATE INTERCONNECTION RATES OF
COMMERCIAL MOBILE RADIO SERVICE PROVIDERS

The Commission concluded in the Second Report and Order that it has the authority to preempt the states from regulating interconnection rates of CMRS providers if the Commission requires interconnection of all such providers (Order, ¶237).

The critical question in any preemption analysis is whether Congress intended that federal regulation supersede state law. Louisiana Public Service Commission v. FCC, 476 US 355, 368 (1986) citing Rice v. Santa Fe Elevator Company, 331 US 218 (1947). Preemption occurs when Congress, (1) in enacting a federal statute, expresses a clear intent to preempt state law; (2) has legislated comprehensively, thus occupying an entire field of regulation; or, (3) where there is, implicit in federal law, a barrier to state regulation. Louisiana Public Service Commission v. FCC, 476 US at 368 (1986).

In enacting the Budget Reconciliation Act (Act)¹ Congress has expressed a clear intent not to preempt the states from regulating the interconnection rates of CMRS providers. The express provisions of the Act address the Commission's role with

¹Budget Reconciliation Act, P.L. 103-66.

respect to interconnection. Specifically, in §332(c)(1)(B), Congress authorized the Commission to order a common carrier to interconnect with CMRS providers pursuant to the Commission's authority in Communications Act Section 201.¹ The Act provides that this paragraph "shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter." (332(c)(1)(B)). Since CMRS providers are treated as common carriers under the Act (332(c)(1)(A)), the Commission's authority with respect to interconnection of CMRS providers is no greater than it would be under Section 201. Therefore CMRS providers, as common carriers, should be treated in a similar manner as other common carriers with respect to intrastate interconnection rates.

Pursuant to 47 USC 152(b), the Commission may not preempt the states from regulating intrastate rates for common carriers. In Louisiana Public Service Commission v. FCC, 476 US at 376, the Supreme Court determined that §152(b) denied federal authority over intrastate matters. Moreover, the Court stated that the Communications Act established a dual regulatory system, and that jurisdictional tensions may develop due to fact that interstate and intrastate service are provided by a single integrated system. Louisiana Public Service Commission v. FCC, 476 US at 375.

¹Section 201 states, in part, "It shall be the duty of every common carrier engaged in interstate or foreign communication... to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission... to establish physical connections with other carriers..."

The issue in Louisiana Public Service Commission v. FCC, 476 US at 375-376, pertained to preemption of state regulation of depreciation for intrastate ratemaking. The Court's analysis is likewise applicable to state regulation of intrastate interconnection rates of CMRS providers. Intrastate interconnection rates are no different than intrastate depreciation rates. The states are vested, pursuant to §152(b), with exclusive power over intrastate rates regardless of the type of rate unless Congress has acted to limit that authority. Clearly, it has not done so here.

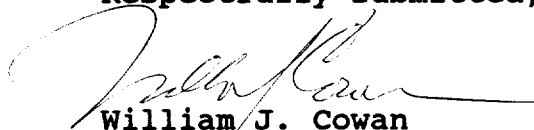
Moreover, the Commission has previously acknowledged the limitation on its Communications Act Section 201 authority. In deciding whether its jurisdiction extended to all charges applicable to the rates that landline carriers charge for cellular interconnection, the Commission emphasized that its authority is limited to the actual interstate cost of interconnection and ensuring that interconnection is provided for interstate services.¹ Recognizing the limitations on the Commission's Communication Act Section 201 authority are no different in that instance, it should also do so here.

¹In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Report No. CL-379, 2FCC Rcd. 2910 (1987) at paragraph 18.

CONCLUSION

For all the reasons stated herein, the Commission may not preempt state regulation of the rates for interconnection of Commercial Mobile Radio Service providers, in the event it chooses to require CMRS providers to provide interconnection to other CMRS providers.

Respectfully submitted,



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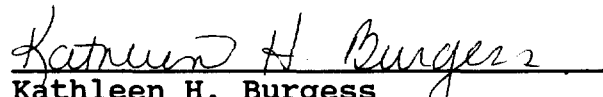
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GN Docket 93-252 - In the Matter of Implementation of Section
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Regulatory Treatment of Mobile Services

Petition for Reconsideration of the
New York State
Department of Public Service
On the Second Report and Order

CERTIFICATE OF SERVICE

I, **Kathleen H. Burgess**, hereby certify that the original and 11 copies of the above-referenced proceeding were sent via Federal Express to Mr. William F. Caton, and a copy by first class United States mail, postage prepaid, to all parties on the attached service list.


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